Supreme Court, U.S.
FILED
JUN 22 2001
CLERK

(11) (5) (5)

Nos. 00-1751, 00-1777, and 00-1779

In The

Supreme Court of the United States

SUSAN TAVE ZELMAN, SUPERINTENDENT OF PUBLIC INSTRUCTION, ET AL., PETITIONERS

v.

DORRIS SIMMONS-HARRIS, ET AL., RESPONDENTS

HANNA PERKINS SCHOOL, ET AL., PETITIONERS

v.

DORRIS SIMMONS-HARRIS, ET AL., RESPONDENTS

SENEL TAYLOR, ET AL., PETITIONERS

v.

DORRIS SIMMONS-HARRIS, ET AL., RESPONDENTS

On Petition for a Writ of Certiorari to the U. S. Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* THE CLAREMONT INSTITUTE CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a school choice program that provides tuition support for parents who choose to send their children to private schools, both sectarian and non-sectarian, violates the Establishment Clause of the First Amendment to the Constitution?

2. Whether the Sixth Circuit's application to the States of an expansive interpretation of the Establishment Clause is incompatible with this Court's recent federalism jurisprudence?

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INTEREST OF *AMICUS CURIAE*[1]

The Claremont Institute for the Study of Statesmanship and Political Philosophy is a non-profit educational foundation whose stated mission is to "restore the principles of the American Founding to their rightful and preeminent authority in our national life," including the principle, at issue in this case, that the kind of moral virtue fostered by religions education was thought by our nation's founders to be a necessary pre-condition of republican government. The Institute pursues its mission through academic research, publications, and scholarly conferences. Of particular relevance here, the Institute and its affiliated scholars have published a number of books and articles on the role of religion in the American constitutional order, including Harry V. Jaffa, The American Founding as the Best Regime: The Bonding of Civil and Religious Liberty (1990); and Thomas G. West, "Religious Liberty: The View from the Founding," in Daniel C. Palm, ed., On Faith and Free Government (1997).

In 1999, the Claremont Institute established an in-house public interest law firm, the Center for Constitutional Jurisprudence, whose purpose is to further the mission of the Claremont Institute through strategic litigation and the filing of *amicus curiae* briefs in cases of constitutional signifycance. The Center has previously participated as *amicus curiae* in this Court in such important cases as *Dale* v. *Boy Scouts*, 530 U.S. 640 (2000), *United States* v. *Morrison*, 529 U.S. 598 (2000), and *Solid Waste Agency of Northern Cook Cty.* v. *U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).

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[1] The Claremont Institute Center for Constitutional Jurisprudence files this brief with the consent of all parties. The letters granting consent are being filed concurrently. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *amicus curiae*, its members, or its counsel made a monetary contribution specifically for the preparation or submission of this brief.

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT'S DECISION THREATENS THE MORAL EDUCATION THAT OUR NATION'S FOUNDERS THOUGHT CRITICAL IN A REPUBLICAN FORM OF GOVERNMENT.

American public schools are facing a crisis. Children are threatened every day by violence, drug abuse, and sexual pressures; test scores are continually falling, and students are failing to graduate. Cleveland, Ohio's public schools have only a 38 percent graduation rate, and only 12 percent of sixth grade students passed the state's mathematics proficiency test in 1999. "Failing Cleveland's Students," Washington Times, 1999 WL 3092877 (Aug. 26, 1999). Fundamentally, this crisis appears to be rooted in the philosophy of moral relativism that has gained sway in our nation's top education establishments and become entrenched in our nation's public school curriculum.

Several states, including Ohio, have begun to address this education crisis by providing to parents—particularly to poor parents—who seek a more hopeful alternative some measure of the funding that the state would otherwise spend on the education of their children. As the dissent below noted, "[t]he *sole* purpose of the voucher program is to save Cleveland's mostly poor, mostly minority, public school children from the devastating consequences of requiring them to remain in the failed Cleveland schools, if they wish to escape." *Simmons-Harris v. Zelman*, 234 F.3d 945, 967 (6th Cir. 2000) (Ryan, J., dissenting in part) (emphasis in original). Despite the successes from parental school choice programs that are already being documented,[2] the Sixth

[2] *See, e.g.*, Thomas C. Dawson and Eric A. Helland, *Helping Hand: How Private Philanthropy and Catholic Schools Serve Low-Income Children in Los Angeles* (Pacific Research Foundation Study, 2001) (finding that Catholic schools in inner cities spend less than half the amount per student as public schools, yet achieve higher test scores); David Myers, et al., *School Choice in New York City after Two Years: An Evaluation of the School Choice Scholarships Program* (John F. Kennedy School of Government Study, 2000) (finding New York City's school choice plan resulted in safer campuses and increased test scores, especially among minority students); Paul Peterson et al., *An Evaluation of the Cleveland Voucher Program after Two Years* (John F. Kennedy School of Government Study, 1999) (finding that the Cleveland Scholarship Program involved in this case achieved greater parental satisfaction and an average test-score increase of about forty percent).

Circuit Court of Appeals has in this case erected an unwarranted constitutional barrier to Ohio's efforts.

The efforts undertaken by Ohio but thwarted by the Sixth Circuit would have been applauded by our nation's Founders, who believed, virtually without exception, that only a virtuous people was fully capable of self-government. This belief is evident in the constitutions they adopted, in their public writings, and in their private correspondence. The Declaration of Rights affixed to the beginning of the Virginia Constitution of 1776, for example, provides "That no free government, or the blessings of liberty, can be preserved to any people, but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles." Va. Const. of 1776, Bill of Rights, Sec.15. The Massachusetts Constitution of 1780 echoes the sentiment: "the happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion, and morality ...." Mass. Const. of 1780, Pt. 1, Art. 3.

But perhaps the clearest example of the Founders' views was penned by James Madison, writing as Publius in the 55th number of The Federalist Papers:

> Republican government presupposes the existence of [virtue] in a higher degree than any other form. Were [people as depraved as some opponents of the Constitution say they are,] the inference would be

> that there is not sufficient virtue among men for self-government; and that nothing less than the chains of despotism can restrain them from destroying and devouring one another.

The Federalist No. 55, at 346 (C. Rossiter and C. Kesler eds., 1999).

In short, the Founders viewed a virtuous citizenry as an essential pre-condition of republican self-government. They were also fully cognizant of the fact that virtue must be continually fostered in order for republican institutions, once established, to survive. Many of the leading Founders, therefore, proposed systems of public education that would help foster the kind of moral virtue they thought necessary for self-government. Perhaps the best example, but by no means the only one, of this sentiment is expressed in the Northwest Ordinance, adopted by Congress in 1787 for the government of the territories: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." *An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio*, Art. 3, 1 Stat. 51, 53 n. a (July 13, 1787, re-enacted Aug. 7, 1789); *see also*, *e.g.*, Mass. Const. of 1780, Ch. V, Sec. 2 ("wisdom and knowledge, as well as virtue, diffused generally among the body of the people [are] necessary for the preservation of their rights and liberties").

As the Northwest Ordinance makes clear, the fostering of moral excellence was, for the Founders, a task intimately tied to religion. President Washington, for example, noted in his Farewell Address that "reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle." George Washington, Farewell Address, *reprinted in* William B. Allen, ed., George Washington: A Collection 521 (1988). Benjamin Rush was even more blunt: "Where there is no religion, there will be no morals."

Benjamin Rush, Speech in Pennsylvania Ratifying Convention (Dec. 12, 1787), *reprinted in* Merrill Jensen, ed., 2 *Documentary History of the Ratification of the Constitution* 595 (1976). Accordingly, he proposed a public school system whose curriculum included religious instruction, noting that such an education would "make dutiful children, teachable scholars, and afterwards, good apprentices, good husbands, good wives, honest mechanics, industrious farmers, peacable sailors, and, in everything that relates to this country, good citizens." Benjamin Rush, To The Citizens of Philadelphia: A Plan for Free Schools, *reprinted in* L.H. Butterfield, ed., 1 Letters of Benjamin Rush 412, 424 (1951) (1786). Even Thomas Jefferson, who coined the phrase, "a wall of separation between church and state,"[3] provided in his proposal for public education in Virginia that

> [t]he first elements of morality, too, may be instilled into [students'] minds, such as...may teach them how to work out their own greatest happiness, by showing them that it...is always the result of good conscience, good health, occupation, and freedom in just pursuits.

Thomas Jefferson, Notes on the State of Virginia, *reprinted in* M. Peterson, ed., Jefferson: Writings 125, 273 (1984).

In addition, several of the States explicitly provided for religious education in their State constitutions. The Pennsylvania Constitution of 1776, for example, provided that "all religious societies or bodies of men heretofore united or incorporated for the advancement of religion or learning...shall be encouraged and protected." Pa. Const. of 1776, § 45; *see also* Vt. Const. of 1777, Ch. II § XLI ("all religious societies or bodies of men that have or may be hereafter united and incorporated, for the advancement of

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[3] Thomas Jefferson, "Letter to the Danbury Baptist Association" (Jan. 1, 1802), *reprinted in* Jefferson: Writings 510 (M. Peterson, ed., 1984).

religion and learning, shall be encouraged and protected"). The Massachusetts Constitution of 1780 and the New Hampshire Constitution of 1784 went even further. The Massachusetts Constitution provides:

> The people of this Commonwealth have the right to invest their legislature with power to authorize and require...the several towns...or religious societies to make suitable provision at their own expense...for the support and maintenance of public protestant teachers of piety, religion and morality.

Mass. Const. of 1780, Pt. I § 3. And New Hampshire's Constitution authorized the legislature

> to make adequate provision at their own expense for the support and maintenance of public protestant teachers of piety, religion and morality" because "morality and piety...will give the best and security to government ....

N.H. Const. of 1784, Pt. I § 5.

While no State has, since the 1830s, supported such a starkly sectarian establishment of religion as is evident in the Massachusetts and New Hampshire constitutions' references to "protestant teachers," several continue to recognize the importance of moral-religious instruction in fostering the kind of citizen virtue the Founders thought necessary to the continued security of the republic. *See, e.g.*, Nebr. Const. Art. 1, § 4 ("Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the Legislature ... to encourage schools and the means of instruction"); Vt. Const. ch. II, § 68; Ind. Const. Art. 8, § 1; Iowa Const., Art. IX, § 3; *see also* Mass. Ann. Laws ch. 71, § 30 (2001) (providing that it is the "duty" of Harvard professors and other teachers of youth "to impress on the minds of children and youth committed to their care and instruction the principles of *piety* and justice" (emphasis

added)). Particularly where, as here, individual parents remain free to direct the state's tuition support to schools of their own choosing, the incidental benefit to religion would have been viewed by the Founders as an added benefit, not a constitutional impediment. Benjamin Rush addressed this point directly in his proposal for a public education system: "The children of parents of the same religious denominations should be educated together," he wrote, "in order that they may be instructed with the more ease in the principles and forms of their respective churches." Benjamin Rush, "Plan for Free Schools," *supra*. "If each society in this manner takes care of its own youth, the whole republic must soon be well educated. It has been found by experience that harmony and Christian friendship between the different religious societies is best promoted by their educating their youth in separate schools." Benjamin Rush, "To The Citizens of Pennsylvania of German Birth and Extraction: Proposal of a German College," *reprinted in* Butterfield, *supra*, at 364.

Given the Founders' views on the subject, the Sixth Circuit's holding that the Constitution they drafted and ratified mandates the *exclusion* of religious schools from the general tuition support program at issue here is extraordinary. Indeed, from the Founders' vantage point, such a holding would have been viewed as dangerous, because it thwarts rather than supports the very kind of moral-religious education that the Founders thought so necessary to the preservation of free government. *Cf.* Martin Luther King, Jr., THE WORDS OF MARTIN LUTHER KING JR. 41 (Coretta Scott King, ed., 1993) ("education which stops with efficiency may prove the greatest menace to society. The most dangerous criminal may be the man gifted with reason but with no morals. We must remember that intelligence is not enough. Intelligence plus character—that is the goal of education"). Given the harm that is likely to flow from the Sixth Circuit's decision, not just to the particular children and schools who have petitioned for this

Court's review, but to the broader society, the decision cannot be allowed to stand without a much more clear basis in this Court's precedent than exists here. In fact, not only is the Sixth Circuit's decision not clearly mandated by this Court's Establishment Clause jurisprudence, it is fundamentally at odds with it.

II. THE SIXTH CIRCUIT'S DECISION IS IN TENSION WITH SEVERAL DECISIONS OF THIS COURT.

A. The Sixth Circuit's Decision Undermines Parental Efforts to Direct the Moral Upbringing of their Children.

In *Pierce* v. *Society of Sisters*, this Court acknowledged that

> [t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

268 U.S. 510, 535 (1925). Parents, this Court held, have the right "to choose schools where their children will receive appropriate mental and religious training." *Id.* at 532; *see also, e.g., Wisconsin* v. *Yoder*, 406 U.S. 205, 232 (1972); *Meyer* v. *Nebraska*, 262 U.S. 390 (1923). This right is "established beyond debate as an enduring American tradition." *Yoder*, 406 U.S., at 232. In fact, this Court has characterized the right to direct the education of one's children as not only a right but a "high duty." *Meyer*, 268 U.S., at 535. "The *duty* to prepare the child for 'additional obligations,' ... must be read to *include the inculcation of moral standards, religious beliefs*, and elements of good

citizenship." *Yoder*, 406 U.S., at 233 (emphasis added) (quoting *Meyer*, 268 U.S., at 535).

Although government is not obligated to subsidize the exercise of this fundamental parental right, this case is not about compelling governmental aid, but rather about whether the Constitution prohibits government from removing a financial impediment to the exercise of the parental right. The Cleveland Scholarship program simply makes it easier for parents to choose alternatives to failing public schools when, in the parents' own view, such is in the best interest of their children.

Because the program is open on equal grounds to both religious and secular private schools, the program respects the rights of religious parents to have their children receive appropriate religious training as well, without being charged twice for the education (tuition plus taxation for educational services which the parent does not utilize). Ohio's laudable efforts to remove a financial impediment to the exercise of parents' fundamental right to direct the moral upbringing of their children no more constitutes an impermissible establishment of religion than any other governmental action that merely accommodates rather than supports religious practice and beliefs. *See Yoder*, 406 U.S., at 235 n.22; *Sherbert* v. *Verner*, 374 U.S. 398, 409 (1963).

B. The Sixth Circuit Misapplied This Court's Decisions Repeatedly Holding That The Independence of Parental Decisions Are A Vital Factor in Determining Whether a Program Constitutes Establishment of Religion.

This Court has repeatedly held that a government education program whose incidental benefits to a religious group are the result of purely private individual choices does not violate the Establishment Clause. *Mitchell* v. *Helms*, 530 U.S. 793 (2000); *Agostini* v. *Felton*, 521 U.S. 203 (1997); *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993);

Witters v. *Washington Dept. of Svcs. for Blind*, 474 U.S. 481 (1986); *Mueller* v. *Allen*, 463 U.S. 388 (1983). Simply put, "government doesn't necessarily endorse private choices that people make with government funds, any more than it endorses cabbage by letting people use food stamps to buy the food of their choice, which may include cabbage." Eugene Volokh, *Equal Treatment Is Not Establishment*, 13 Notre Dame J. L. Ethics & Pub. Pol'y 341, 357-358 (1999).

Mueller is particularly instructive. This Court upheld a Minnesota law that permitted parents to deduct from their state taxes the amount of money they spent in sending children to private schools, including religious ones, because

> under Minnesota's arrangement, public funds become available only as a result of numerous private choices of individual parents of school-age children. For these reasons, we recognized in [*Committee for Public Ed. & Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973)] that the means by which state assistance flows to private schools is of some importance.... Where, as here, aid to parochial schools is available only as a result of decisions of individual parents, no "imprimatur of state approval," can be deemed to have been conferred on any particular religion, or on religion generally.

Mueller, 463 U.S., at 399.

Likewise, under the Cleveland Scholarship Program, "any money that ultimately [goes] to religious institutions d[oes] so 'only as a result of the genuinely independent and private choices of' individuals." *Agostini*, 521 U.S., at 226. The State of Ohio no more endorses a religious viewpoint—or sends a message of favoritism—than it endorses cabbage by providing poor people with food stamps.

The Circuit Court found this freedom of choice to be "illusory" because "82 percent of the participating schools

were sectarian," *Zelman*, 234 F.3d, at 959, but the fact that most schools participating in the program are religious does not turn this admittedly facially neutral program, *see id.* at 949, into an impermissible establishment of religion. This Court has emphatically rejected such reasoning: "*We would be loath* to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law." *Mueller*, 463 U.S., at 401 (emphasis added). This Court's precedent at least makes clear that in such a case the question must not be *how many recipients happen to be religious*, but instead *whether*, due to the program, *an endorsement of one faith can be reasonably attributed to the government's actions*.

Quite simply, the private choices of parents cannot be attributed to the government, and thus become an establishment of religion, merely because those choices are supported by (rather than induced by) state funding which would have gone to educate the child anyway. In short, as the Ohio Supreme Court held when rejecting the parallel state court challenge to the Cleveland Scholarship Program, "[t]o the extent that children are indoctrinated by sectarian schools receiving tuition dollars that flow from the School Voucher Program, it is not the result of direct government action." *Simmons-Harris v. Goff*, 86 Ohio St. 3d 1, 7 (1999). The Sixth Circuit's holding to the contrary, that "*practically speaking*," parents had no real freedom of choice, because too many religious schools participated in the program, *id.* at 959, is based on precisely the nose-counting rationale that this Court was "loath to adopt" in *Mueller*.

C. The Circuit Court Misapplied This Court's Repeated Holding That Religious Neutrality Is A Vital Factor in Determining Whether A Government Program Establishes Religion.

The Court of Appeals also held that the Cleveland

Scholarship Program was not religiously neutral. As the dissent below noted, this conclusion lacked even "a scintilla of evidence." *Zelman*, 234 F.3d, at 970 (Ryan, J., dissenting in part). Indeed, the majority opinion acknowledged that "the voucher program does not restrict entry into the program to religious or sectarian schools." *Id.*, at 959. Yet it went on to find the program non-neutral because religious schools "often have low overhead costs, supplemental income from private donations, and consequently lower tuition needs." *Id.* (citing Martha Minow, "Reforming School Reform," 68 Fordham L. Rev. 257, 262 (1999)). In other words, because religious schools are cheaper, a program which grants benefits *equally* to religious and non-religious schools is made unequal precisely *because it does not discriminate*. The Sixth Circuit's definition of neutrality borders on the Orwellian, and it is contrary to this Court's repeated holding that religious organizations should not be treated less favorably than non-religious organizations in the provision of governmental aid. *See, e.g., Rosenberger* v. *Rector of the University of Virginia*, 515 U.S. 819 (1995).

Just this month, this Court reiterated the importance of considering the religious neutrality of a government program in evaluating its Establishment Clause effects. In *Good News Club* v. *Milford Central School*, No. 99-2036, 2001 WL 636202 (June 11, 2001), this Court noted that "[i]n distinguishing between indoctrination that is attributable to the State and indoctrination that is not, [the Court has] consistently turned to the principle of *neutrality*, upholding aid that is offered to a broad range of groups or persons without regard to their religion." Slip Op. at 14 (*quoting Mitchell*, 530 U.S., at 838 (O'Connor, J., concurring in judgment)). The Good News Club sought "nothing more than to be treated neutrally and given access to speak [on the same terms] as are other groups." *Id.* In exactly the same way, religious schools which participate in the Cleveland Scholarship Program have received nothing more than

neutral treatment and an equal opportunity to participate in the program.

The Cleveland Scholarship Program is also religiously neutral because no reasonable bystander would perceive it a State endorsement of religious schools. On the contrary, the Sixth Circuit's decision *excluding* religious schools from the program amounts to a negative endorsement that the plurality opinion in *Good News Club* found constitutionally troubling. *See id.*, at 18 ("Any bystander could conceivably be aware of the school's use policy and its exclusion of the Good News Club, and could suffer as much from viewpoint discrimination as elementary school children could suffer from perceived endorsement"). So, too, here: Any bystander could conceivably be aware of the Cleveland Scholarship Program's terms, and if those terms are read to specifically exclude religious schools, such an exclusion would "send[] a message to nonadherents that they are outsiders, not full members of the political community." *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

The Sixth Circuit, relying on Justice O'Connor's opinion concurring in the judgment in *Mitchell*, correctly noted that neutrality is not the sole consideration in an Establishment Clause case, but it failed to give full regard to the entirety of Justice O'Connor's opinion. Primarily, the Sixth Circuit never came to grips with Justice O'Connor's explanation that a Program

> distributing aid directly to individual students who, in turn, decide to use the aid at the same religious schools...supports a school's religious mission only because of independent decisions made by numerous individuals to guide their secular aid to that school [in which case] "no reasonable observer is likely to draw from the facts...an inference that the State itself is endorsing a religious practice or belief." Rather, endorsement of the religious message is reasonably

attributed to the individuals who select the path of the aid.

Mitchell, 530 U.S., at 842-843 (quoting *Witters*, 474 U.S. at 493 (O'Connor, J., concurring in judgment)).

The Court of Appeals failed to apply the proper neutrality analysis, and has therefore misapplied this Court's binding precedent.

D. The Circuit Court Misapplied This Court's "Effects" Test As Modified by *Agostini*.

The Court below based its opinion largely on *Committee for Public Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973). Yet this Court has acknowledged that "Establishment Clause jurisprudence has changed significantly" since the *Nyquist* case. *Agostini*, 521 U.S., at 236; *see also id.*, at 223 ("What has changed...is our understanding of the criteria used to assess whether aid to religion has an impermissible effect").

To determine whether a government program has an impermissible effect of favoring religion, this Court now asks whether it "result[s] in governmental indoctrination; define[s] its recipients by reference to religion; or create[s] an excessive entanglement." *Agostini*, 521 U.S., at 234. The Cleveland Scholarship Program does none of these things. The Program does not result in governmental indoctrination because no "religious indoctrination that occurs in these schools could reasonably be attributed to government action." *Mitchell*, 530 U.S., at 809 (Thomas, J:, plurality opinion). Indeed, the whole reason parents wish to send their children to private religious schools is because they are *dissatisfied* with government action to begin with; it is unlikely that they would get the impression that the religious school is acting as a government entity.

Nor does the Cleveland program define its recipients by reference to religion. As the Sixth Circuit itself conceded,

the program is facially neutral. *Zelman*, 234 F.3d, at 949. Finally, unlike the remedial program at issue in *Agostini*, there will be no government employees teaching on the premises of sectarian schools under the Cleveland program. Since the aid program in *Agostini* did not constitute an excessive entaglement of religion, the far less entangling program here clearly does not either.

III. THE CIRCUIT COURT OPINION SETS CONFUSING AND CONTRADICTORY PRECEDENT ON A MATTER OF VITAL NATIONAL IMPORTANCE.

The Sixth Circuit's ruling comes at a time when school choice programs across the nation are being tested for constitutionality. Yet while several other courts, including the Ohio Supreme Court addressing the very program at issue here, have upheld these programs against Establishment Clause challenges, the Sixth Circuit has, in stark contrast, held the Ohio program to be unconstitutional. In *Simmons-Harris* v. *Goff*, for example, the Supreme Court of Ohio held that the Cleveland Scholarship Program did not violate the Establishment Clause because "[w]hatever link between government and religion is created by the School Voucher Program is indirect, depending only on the 'genuinely independent and private choices' of individual parents, who act for themselves and their children, not for the government." 86 Ohio St. 3d 1, 7 (1999) (*quoting Witters*, 474 U.S., at 487). Similar programs have been upheld in Illinois, Florida, Wisconsin, and Arizona. *See Griffith* v. *Bower*, 2001 Ill. App. LEXIS 248 (Ill. App. Ct. 5th Dist. Apr. 3, 2001); *Bush* v. *Holmes*, 767 So. 2d 668 (Fl. 2000); *Jackson* v. *Benson*, 578 N.W.2d 602 (Wis.), *cert. denied*, 525 U.S. 997 (1998); and *Kotterman* v. *Killian*, 193 Ariz. 273 (Ariz.), *cert. denied*, 528 U.S. 810 (1999). Demonstrating the depth of the split on this issue, however, parental choice programs have been struck down in Vermont and Maine. *See Chittenden Town Sch. Dist.* v. *Vermont Dep't of Educ.*, 169 Vt. 310 (Vt.), *cert. denied sub nom*

Andrews v. *Vermont Dep't of Educ.*, 528 U.S. 1066 (1999); *Bagley* v. *Raymond Sch. Dep't*, 728 A.2d 127 (Me.), *cert. denied* 528 U.S. 947 (1999).

The different holdings by the Sixth Circuit and the Ohio Supreme Court about the constitutionality of the Cleveland program presents the most direct conflict, of course. The Ohio Supreme Court held that the Cleveland Scholarship Program did not have an impermissible effect of advancing religion because "[t]he primary beneficiaries of the [Scholarship Program] are children, not sectarian schools." *Goff*, 86 Ohio St. 3d, at 9. The Sixth Circuit, on the other hand, held that the Program *does* have an impermissible effect of advancing religion because there are "no restrictions on the religious schools as to their use of the tuition funds—the funds may be used for religious instruction or materials as easily as for erasers and playground equipment." *Zelman*, 234 F.3d, at 959.

The conflict with other State courts is equally stark. The Wisconsin Supreme Court, for example, upheld a program that, like the Ohio program at issue here, gave "participating parents the choice to send their children to a neighborhood public school, a different public school within the district, a specialized public school, a private nonsectarian school, or a private sectarian school." *Jackson*, 218 Wis. 2d, at 869. "As a result," the Wisconsin Court continued, "the amended program is in no way 'skewed towards religion.'" *Id.* at 870 (*quoting Witters*, 474 U.S., at 488). The Sixth Circuit, on the other hand, refused to consider the entirety of the Cleveland program, instead focusing only on the portion of the program that was available to sectarian schools. *Zelman*, 234 F.3d, at 958.

Moreover, although the Sixth Circuit rendered its decisions months after this Court's holding in *Mitchell* v. *Helms* called into question the continued vitality of *Nyquist*, the Sixth Circuit held that *Agostini* required it to abide by the

Nyquist holding until this Court explicitly overrules the decision or holds a school choice program constitutional despite *Nyquist*. *See Zelman*, 234 F.3d, at 954-955. Because this Court has already denied certiorari in several cases involving similar school choice programs, parents in some parts of the country are able to receive tuition support for their private educational choices while parents in other parts of the country are not. Only a definitive ruling from this Court, therefore, can restore uniformity in this important area of the law.

IV. THE SIXTH CIRCUIT'S INTERPRETATION OF THE ESTABLISHMENT CLAUSE IS AT ODDS WITH THIS COURT'S RECENT FEDERALISM DECISIONS.

Perhaps most fundamentally, even were the Sixth Circuit's interpretation of the Establishment Clause a logically-compelled extension of this Court's Establishment Clause jurisprudence, the Sixth Circuit's interpretation is at odds with this Court's recent federalism decisions. Because the Ohio Supreme Court and the Sixth Circuit Court of Appeals reached opposite conclusions with respect to the very same program, this case brings the federalism question into sharp relief.

It has long been settled that the First Amendment (like the other provisions of the Bill of Rights) was intended to apply only to the federal government, not to the state governments. "*Congress* shall make no law ..." meant precisely that. U.S. Const. Amend. I (emphasis added); *see also Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833); *Permoli v. New Orleans*, 44 U.S. (3 How.) 589 (1845) (holding the Free Exercise clause inapplicable to the states). This is particularly true with respect to the Establishment Clause, whose language, "Congress shall pass no law *respecting* the establishment of religion," was designed with a two-fold purpose: to prevent the federal government from

establishing a national church; and to prevent the federal government from interfering with the state established churches and other state aid to religion that existed at the time. *See, e.g.,* W. Katz, Religion and American Constitutions 8-10 (1964); M. Howe, The Garden and the Wilderness 23 (1965) (both cited in G. Stone, et al., eds., Constitutional Law 1539 (3d ed. 1996); *see also* Neil Cogan, The Complete Bill of Rights 1-8, 53-62 (1997) (reprinting the debates in Congress leading to the proposal of the First Amendment's religion clauses).

Of course, the 14th Amendment affected a fundamental change in our constitutional order and was intended to afford individuals federal protection against state governments that would interfere with their fundamental rights. But the Establishment Clause is on its face different in kind than the other provisions of the Bill of Rights that had previously been incorporated and made applicable to the states via the 14th Amendment. The Free Speech and Free Exercise Clauses, for example, are much more readily described as protecting a "liberty" interest or a "privilege" of citizenship than is the Establishment Clause, yet when this Court in *Everson* v. *Board of Ed.*, 330 U.S. 1 (1947), held that the clause was incorporated and made applicable to the States via the Due Process clause of the 14th Amendment, it merely cited its prior cases incorporating those two clauses, without any analysis of the evident differences between them and the Establishment Clause. *See id.*, at 5 (citing *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943), a free exercise case); *id.*, at 15 (citing, e.g., *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940), a free exercise case, which in turn relied upon *Schneider* v. *State*, 308 U.S. 147 (1939), a free speech case).

Moreover, the application of the Establishment Clause to the states has allowed the federal courts and, via section 5 of the 14th Amendment, the Congress, to do the very thing the clause was arguably designed to prevent, namely, federal interference with state support of religion. Indeed, the

constitutional prohibition on federal intrusion into this area of core state sovereignty is much more explicit than the prohibition on federal commandeering of state officials, *see New York* v. *United States*, 505 U.S. 144 (1992), the limits of federal power inherent in the doctrine of enumerated powers, *see United States* v. *Lopez*, 514 U.S. 549 (1995), or even the barrier to federal power erected by the doctrine of state sovereign immunity that this Court has held to be implicit in the 11th Amendment, *see Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44 (1996). Yet in each of these latter areas, this Court has in recent years given renewed attention to the limits of federal power.

This Court need not revisit the long-standing precedent incorporating the Establishment Clause, however, in order to give due consideration to that precedent's effect on federalism. All that is required is for this Court to recognize that the scope of activity prohibited by the Establishment Clause may well be narrower with respect to the States than with respect to the Federal government. Such a distinction is particularly important in light of the fact that the States rather than the federal government have historically been viewed as the respository of the police power—that power to regulate the health, safety, welfare, *and morals* of the people. *See, e.g., Barnes* v. *Glen Theatre, Inc.*; 501 U.S. 560, 569 (1991); *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 304 (1932). Thus, even if the Sixth Circuit's "no aid to any or all religions, directly or indirectly," were an appropriate interpretation of the Establishment Clause vis-à-vis the federal government, certiorari is warranted here to consider whether such an expensive interpretation can properly be applied to the states without intruding into core areas of state sovereignty.

CONCLUSION

For all of the above reasons, the petitions for a writ of certiorari should be *granted.*

Respectfully submitted,

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DATED: June 22, 2001